STATE OF MICHIGAN

COURT OF APPEALS

SECURITY FINANCIAL SERVICES, INC.

Plaintiff-Appellant,

v

LOUIS MERAM,

Defendant-Appellee.

UNPUBLISHED
June 12, 2003

No. 238778
Oakland Circuit Court
LC No. 01-028566-CK

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Plaintiff Security Financial Services, Inc. appeals as of right an order of the trial court granting summary disposition in favor of defendant Louis Meram in this contract case in which plaintiff seeks to hold defendant liable as a guarantor. We reverse and remand.

I

Plaintiff filed this action against defendant for breach of a personal guaranty of a Money Order Trust Agreement (MOTA). Plaintiff provides money orders to businesses for sale to the public. On May 6, 1992,[1] defendant signed an agent application on behalf of Ringler Market, Inc., doing business as "Ringler Market," to become a Security Express money order agent with plaintiff. On the same date, defendant signed a MOTA[2] on behalf of Ringler Market as its vice-president. The MOTA contained provisions for plaintiff to provide money orders for sale by the agent Ringler Market, and for the agent to report the sales of money orders twice weekly, on Monday and Thursday, remitting the proceeds of sales during the reporting period.

[1] There apparently is no dispute that the documents at issue were signed on the dates indicated on the face of the documents.

[2] The MOTA was a two-page, legal-size, form agreement, preprinted with plaintiff's information and blank spaces for the agent information.

Following the signature lines on the MOTA was a section entitled "Personal Guaranty." This section contained a provision that those signing as guarantors, jointly and severally, personally guaranteed the agent's full performance under the MOTA. The form MOTA had spaces for three separate guarantors to sign. Defendant, Najib Meram, and Sabah Najor, each signed the personal guaranty on the MOTA signed by defendant on May 6.

On May 18, 1992, Manuel Meram, now deceased, signed as a guarantor on a separate MOTA/Personal Guaranty form for Ringler Market, with terms identical to the May 6 MOTA. Manuel also signed the MOTA itself as "co-signor." Both MOTA's were signed by plaintiff's president on May 20, 1992, indicating acceptance by plaintiff, each with a May 20, 1992 effective date.

In July 1996, Ringler Market was sold to Najor.[3] There is no indication that defendant informed plaintiff that he no longer had an interest in Ringler Market. There is also no indication that there was any change in the money order arrangement or that a new MOTA was effected for the new corporation.

In December 1997, Ringler Market defaulted on the MOTA with plaintiff by failing to forward payment of $30,000[4] for money orders. When plaintiff attempted to collect from defendant, as a personal guarantor on the Ringler Market MOTA, defendant responded that he no longer had an interest in the business and was not liable as a guarantor. Plaintiff filed this action seeking to recover damages against defendant.

The parties filed cross-motions for summary disposition. The court granted defendant's motion and denied plaintiff's motion. The court concluded that the personal guaranty signed by plaintiff was not a continuing guaranty such that it survived the sale of defendant's interest in Ringler Market in 1996.

II

We review de novo a trial court's decision on a motion for summary disposition. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. In deciding a motion pursuant to MCR 2.116(C)(10), the trial court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence in a light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute and the moving party is entitled to judgment as a matter of law. *Id*. at 454-455.

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[3] According to the bill of sale the seller was "Ringler Market, Inc., By: Louis Meram, President," and the purchaser was "D&A Ringler, Inc., By: Sabah Najor, President."

[4] To mitigate damages, plaintiff stopped payment on outstanding money orders, reducing the amount due to $22,724.44.

The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mut Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999). This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998).

In construing a contract of guaranty, the intention of the parties governs. *First Nat'l Bank of Ypsilanti v Redford Chevrolet Co*, 270 Mich 116, 121; 258 NW2d 221 (1935). Where the language of the contract is unambiguous, construction is a question of law for the court, on a consideration of the entire instrument. *In re Landwehr's Estate*, 286 Mich 698, 702; 282 NW 873 (1938); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

III

Plaintiff argues that the trial court erred in finding that the guaranty signed by defendant was not a continuing guaranty. Plaintiff further argues that the court erred in concluding that the guaranty did not apply to the debt owed after defendant sold Ringler Market to Najor. We address these matters separately.

A. Continuing Guaranty

A guarantee is a collateral undertaking or promise by one person to answer for the nonperformance of an obligation of another who is liable in the first instance. *Angelo Iafrate Co v M & K Development Co*, 80 Mich App 508, 514; 264 NW2d 45 (1978). "Guaranties are creatures of contract." Roush, *Business Problems & Planning: Drafting Guaranties and Indemnities*, 74 Mich BJ 940 (1995). Like any other contract, there must be an offer and an acceptance to constitute a guaranty contract. 18 Michigan Pleading and Practice, Guaranty § 3, p 31. Guaranties may be single transactional or continuing. Roush, *supra*.

"A guaranty that covers transactions arising in the future within the contemplation of the agreement will be considered a continuing guaranty." 18 Michigan Pleading and Practice, § 24, p 41, citing *Furst v Larsen*, 252 Mich 291, 233 NW2d 320 (1930) and *Nat'l Bldg Supply Co v Spencer*, 211 Mich 228, 178 NW 655 (1920). In this case, that the guaranty would cover transactions arising in the future was clearly within the contemplation of the parties. Defendant provided a guaranty for plaintiff's MOTA with Ringler Market, under which plaintiff would make advances of money orders, and payments would be returned by Ringler Market according

to a twice-weekly reporting and remittance schedule. The guaranty was not based on a one-time transaction, but rather on continuing transactions on an ongoing basis.[5]

In fact, defendant did not argue that his guaranty was not a continuing guaranty while he had an interest in Ringler's Market, during which time, presumably, plaintiff and defendant operated under the MOTA on a continuing basis, from week to week. Rather, defendant argues merely that his guaranty did not extend to the period after he sold his interest in Ringler Market. Because a continuing guarantee was clearly within the contemplation of the parties, and acted on, the presumption against a continuing guaranty, applied by the trial court in this case pursuant to *Sanilac Co v Burgess*, 265 Mich 177, 181; 251 NW 384 (1933), does not arise.

Even though a guaranty is a continuing guaranty, it may be for a limited duration. *Nat'l Bldg Supply Co, supra*. "A guaranty is operative when accepted and acted on and continues during the time provided for in the contract." 18 Michigan Pleading and Practice, § 24, p 41. In this case, there is no duration expressly provided in the contract. Although a duration may be implied, *id*., defendant does not specifically argue that a limited duration is implied in the contract.[6]

We conclude that the guaranty signed by defendant was a continuing guaranty, which was not of a limited duration such that the guaranty ended upon the sale to Najor.[7]

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[5] The MOTA clearly contemplated that plaintiff would provide money orders to Ringler Market on a continuing basis during the life of the agreement, which was one year from the date of acceptance and for an indefinite time thereafter until canceled by one of the parties. Defendant guaranteed Ringler Market's full performance of the agreement and assumed liability for plaintiff's losses due to Ringler Market's failure to fully perform the agreement. The agreement was of indefinite duration and contemplated future disbursements of money orders, and the guaranty was tied to performance of the agreement.

[6] Defendant and Najor were jointly involved in the 1992 undertaking with plaintiff. According to an affidavit submitted by plaintiff, Najor was the manager of Ringler Market. Najor signed as a guarantor on the MOTA signed by defendant for Ringler Market. Further, after his purchase, Najor operated the business under the same name, "Ringler Market." The bill of sale indicates that Ringler Market, Inc. sold the market to D&A Ringler, Inc., and the sale included the trade name.

[7] Plaintiff does not contest the court's finding that there are two separate MOTA's, and we do not consider this finding a dispositive factor. We agree with the trial court, that the MOTA signed by Manual Meram was mistakenly attached as an exhibit to the Plea for Confession of Judgment in the action against Najor because the Plea, in fact, referred to the MOTA guaranteed by Najor, and the attached MOTA was clearly not guaranteed by Najor. The only MOTA in evidence guaranteed by Najor was the MOTA signed on May 6 by defendant. It is unclear whether the court's finding of two separate MOTA's encompassed a finding that they were not part of the same overall agreement.

B. Guarantor Release or Discharge

The next consideration is whether defendant was otherwise released or discharged from his guaranty. "A guarantor may be discharged or released from liability by a breach of the contract of guaranty." 18 Michigan Pleading and Practice, § 31, p 44.

Defendant argues that if his guaranty survived the sale of Ringler Market, he was otherwise discharged from his guaranty 1) when plaintiff entered into a new relationship with Najor and D & A Ringler, Inc., to which defendant was not a party and to which he did not consent, 2) by failing to cancel its contract with Najor, and 3) by failing to notify defendant of Najor's continuing default, such that defendant was prejudiced. We find no conclusive evidence to support defendant's argument thereby warranting summary disposition on this basis.

Defendant argues that he is discharged from the guaranty because plaintiff sufficiently altered the relationship between itself and Ringler Market. This argument is premised on factual assertions that are in dispute.[8] Defendant asserts that plaintiff entered into a separate MOTA with Ringler Market and Najor without defendant's knowledge and consent, and allowed the new agent (Najor) to continue his fraud and to either become delinquent or further its delinquency. Contrary to defendant's assertion, we find no evidence of a MOTA entered into by plaintiff and Najor, with Najor as agent. The Plea for Confession of Judgment on which defendant relies, refers to the MOTA guaranteed by Najor.[9]

Defendant asserts that plaintiff knew of the sale. There is no evidence that defendant notified plaintiff of the sale at the time it occurred or before any default. Plaintiff submitted an affidavit averring that it did not learn of the sale until after January 1998, after the default. This is an issue of disputed fact. To the extent that defendant was negligent in failing to notify plaintiff of the sale and suffered prejudice as a result, that may be a factor in recovery. "[A] guarantor may not take advantage of his or her own negligence." 18 Michigan Pleading and Practice, § 43, p 54.

Defendant argues that the agreement with Najor, allowing for a confession of judgment following the default, was entered into without defendant's knowledge or consent, which altered defendant's position and prejudiced him. When the person in whose favor the guaranty operates takes additional security, that does not in itself release the guarantor. *Id.*, § 31, p 45. Further,

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[8] We therefore reject defendant's collateral estoppel arguments.

[9] "As in the case of other contracts, there must be an offer and an acceptance for there to be a contract of guaranty." 18 Michigan Pleading and Practice, § 3, p 31. Although one MOTA was signed on May 6, 1992 and another on May 18, 1992, both guaranties were accepted on the same date, May 20, 1992. Both guaranty agreements were therefore consummated on the same date. Thus, there is no logical basis for concluding, as defendant apparently contends, that the offer of guarantee by Manuel Meram on May 18 supplanted the offer of guarantee signed by defendant on May 6.

"[t]he remedy against a guarantor is not primary and direct, but is collateral and secondary." *Id*., § 41, p 51.[10]

Defendant asserts that after becoming aware of Najor's practice of failing to remit the funds for the money orders, plaintiff failed to take action to cancel its contract with Ringler Market. Defendant also asserts that plaintiff failed to provide notice of Najor's default until at least six months later. Whether a defendant is entitled to notice of default depends on the nature of the guaranty. *Id*., § 25, p 43 and § 35, pp 49-50. In the case of an absolute guarantee, notice is not a prerequisite to an action on the guaranty; however, it is required to keep the guaranty in force where the lack of notice caused loss or damage to the guarantor. *Id*., § 25, p 43.

We find no basis on the record before us for a conclusion as a matter of law that defendant was discharged or released from liability. Likewise, we find no basis for a reversal of the trial court's denial of plaintiff's motion for summary disposition. On this record there are unresolved factual issues, and defendant's liability cannot be determined. Therefore, the trial court's grant of summary disposition was improper.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten F. Kelly

[10] We therefore find defendant's collateral estoppel arguments based on "collateral attack" untenable.